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No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

NOVEMBER, 1931.

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OPINIONS

The opinion of the specially constituted District Court denying the application for a preliminary injunction (R. 698) is reported in 51 F. (2d) 510.

The reports of the Commission appear as Docket No. 17000, *Rate Structure Investigation, Part VII, Grain and Grain Products within the West-*

ern District and for Export (R. 69, 275), and are reported in 164 I. C. C. 619 and 173 I. C. C. 511.

QUESTIONS

In a proceeding before the Interstate Commerce Commission involving rates on grain and grain products within the Western District and for export, which was part of a general investigation into the rate structure of carriers subject to the interstate commerce act undertaken pursuant to direction of Congress contained in the Hoch-Smith Resolution,[1] the Commission, upon findings that the then rates on grain and its products, and practices thereunder, were unreasonable and unduly preferential and prejudicial, entered orders requiring the establishment of reasonable and justly related rates, abolishing certain practices and imposing limitations or restrictions upon others. Following the hearing in the suit brought by the carriers and others, whereat applications both for a restraining order and a preliminary injunction were submitted (R. 658), the lower court, on May 7, 1931, issued a restraining order staying the Commission's orders 60 days to enable it to determine the legal questions presented. On July 7, 1931, said court entered its order (R. 708) denying the application for preliminary injunction; and from that order the carriers have taken this appeal.

[1] Public Resolution No. 46, 68th Congress, 43 Stat. 801, set forth in full in Appendix to this brief.

In its report the Commission had expressly referred to this Court's holding in *Ann Arbor R. R.* v. *United States,* 281 U. S. 658, that the Hoch-Smith Resolution sets up no standard of rate lawfulness other than as provided by existing law, and stated that "The findings herein are under the provisions of the interstate commerce act."[2] Appellant carriers have not challenged the validity of the orders on the ground of lack of supporting evidence (R. 696) and the record made before the Commission has not been introduced in the suit. The questions presented are;

1. Whether the Commission misconstrued the Hoch-Smith Resolution to set up a standard of rate reasonableness and relation different than as provided in the Interstate Commerce Act.

2. Whether the Commission misconstrued the provisions of Section 15a of the Interstate Commerce Act.

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[2] That *Ann Arbor R. R.* v. *United States,* 281 U. S. 658, did not affect the direction given to the Commission by the second paragraph of the Hoch-Smith Resolution to undertake thorough investigation of the rate structure of the country is shown by the decision in that case, wherein it was said, at page 667:

"The second paragraph is devoted chiefly to requiring the Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws, such as sections 1 (5) and 3 (1) of the Interstate Commerce Act, requiring that all rates be just and reasonable and prohibiting all undue preferences and unjust discriminations, whether relating to shippers, commodities, classes of traffic or localities. * * *"

3. Whether the Commission's action, in denying petitions for rehearing and reconsideration, was an arbitrary abuse of its discretion.

4. Whether there were irregularities in the Commission proceedings.

STATUTES

The pertinent provisions of the Interstate Commerce Act and the provisions of the Hoch-Smith Resolution are set forth in the Appendix to this brief.

STATEMENT

1. PROCEEDINGS BEFORE THE COMMISSION

In response to direction contained in the joint resolution of Congress known as the Hoch-Smith Resolution (43 Stat. 801) the Interstate Commerce Commission on March 12, 1925, instituted an investigation of the rate structure of common carriers subject to the Interstate Commerce Act (R. 45) and, thereafter, divided the investigation into separate proceedings, each to cover rates on particular kinds of traffic. The proceeding, in which the orders here involved were entered, related to "rates and practices affecting the transportation of grain and grain products throughout the Western District (on and west of the Mississippi River, including east bank crossings) and in Illinois; from lower lake ports to Atlantic ports on ex-lake grain (grain transported across the Great Lakes to lower lake ports); and from all points in the Western District

to all ports of export." *Rate Structure Investigation, Part VII, Grain and Grain Products within Western District and for Export*, 164 I. C. C. 619, 625. (R. 69, 75.)

The grains involved were wheat and coarse grains, also flaxseed. The coarse grains were mainly corn, oats, rye, and barley; the grain products were chiefly flour and mill feeds. (R. 75.)

Disposed of with the main proceeding, as shown by Appendix A of the report, there were 38 formal complaint and suspension proceedings, also subnumbers thereof (R. 69, 197), which, considered together, brought in issue all phases of the grain rate structure involved in the Commission's general investigation. Many state commissions, chambers of commerce, boards of trade, traffic associations, and individual shippers and producers intervened and participated in the proceeding.

Hearings were held in many cities and extended over a period of more than a year. Oral argument before the Commission lasted 20 days. During the year which elapsed between the submission of the case, July 1, 1929, and issuance of the first report, July 1, 1930, "thorough examination" was "made not only of the immediate transcript of some 53,000 pages, but also of the 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums." (R. 147.) Further painstaking examination of that record was made during the period elapsing between the

issuance of said first report and the issuance of the supplemental report, April 10, 1931. (R. 275.)

Specifying the main issues the Commission said:

> The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service. (R. 71.)

Inextricably involved in the determination of those main issues, and brought into sharp relief by the record, there were the further issues as to whether certain regulations of the carriers in connection with the "transit privilege" (presently to be described) were reasonable and nondiscriminatory. Thereunder it was the common practice, except in the northwest, to accord successive free stops[3] in transit of grain or its products and, often

[3] Where no extra charge is exacted from the persons receiving the terminal services incidental to stops in transit. (R. 103, 159, 193.) Carriers in the Northwest made extra charge on parts of their lines (R. 104).

coupled therewith, to perform extensive back-haul and out-of-line service[4] without extra charge exacted from those desiring and receiving the service (R. 103, 194, 158, 159, 193); thereunder there had grown up the dual system of proportional rates[5] and much lower "transit balances"[6] from primary

[4] By back-haul is meant a diversion from the direct route of shipment to a transit point and back to the point of diversion for continuation over the direct route; by out-of-line haul a diversion from the direct route to a transit point and back to the direct route at a point other than the point of diversion. (R. 103.)

[5] As used in the report "A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound. The freight bill need cover only an equivalent inbound tonnage, as preservation of identity grain is not required. (R. 83.)

[6] A transit balance is the remainder of a one-factor (single line or joint) through rate from origin to destination after deducting the rate paid at completion of the inbound movement to the transit point. (R. 83.) Proportional rates (except varying proportionals to be discussed later) are constant in amount to any particular destination, whereas transit balances vary in amounts dependent upon origin of the inbound shipments. "If the inbound freight bill covers a shipment from an origin point from which there is no overhead rate, with transit to final destination, the outbound shipment is at the proportional rate." (R. 84.)

markets' (R. 86 to 89, 193), causing discrimination and having substantial effect on carrier revenues; and, commonly used, there was the "unit rule" (R. 106), under which the rate on mixed feed from milling points could be the balance of the through rate on any of its ingredients, however small the quantity of the ingredient and whatever the level of its rate, upon surrender of inbound expense bills covering an aggregate tonnage of that commodity equal to the weight of the outbound shipment of mixed feed. This rule was shown to be applied even where the transit balance was nothing, due to the identity of rate from origin to transit point with rate from that origin to reshipping destination. (R. 193.)

Broadly speaking, the transit privilege is that grain may be stopped at primary or other markets or interior milling of storage points for storing, conditioning, milling, and other purposes, and that it or its products may be reshipped at "transit balance" or "proportional rate," both hereinabove defined. The practice of according such privilege antedates the enactment of the Interstate Commerce Act (*A. T. & S. F. Ry.* v. *U. S.*, 279 U. S. 768, 778; *Transit Case*, 24 I. C. C. 340, 348) and, in its

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1 "Primary markets," as herein used, refers to markets such as Duluth, Minneapolis, Sioux City, Omaha, St. Louis, Chicago, and Kansas City at which grain is stored in large quantities and from which proportional rates apply. Some of these markets (R. 82) are price-registering markets, that is, they have their individual prices for grain instead of merely reflecting the prices of other markets.

reasonable application, it is a natural development to fit the needs of the grain producing and marketing industries.

The average wheat crop of the United States is approximately 800,000,000 bushels, of which about 600,000,000 bushels are consumed in the domestic trade and about 200,000,000 bushels are exported. This tremendous tonnage begins to move from the winter wheat territories of the Southwest late in May, and the movement continues progressively with the season from States in the spring wheat areas farther north until late in the summer. Of the new crop much is taken by our millers, and much also is exported through the Gulf, Atlantic, and Pacific ports, including large quantities that seek outlets over the Great Lakes from Lake Michigan and Lake Superior ports to ports of export in the United States and Canada. (R. 81, 82.) Grain can not ordinarily be taken directly from the field to the consumer, but must be stored and sold at some concentrating point. Particularly, after the first purchases from a new crop are made from domestic milling or export, there is a large surplus, which can not be at once thrown on the export trade or on the domestic consuming market and must, therefore, be temporarily stored or find an intermediate market. This grain moves into interior milling or storage points and, in large quantities, into the important grain markets such as Kansas City, St. Joseph, Omaha, Sioux City, St. Louis, Peoria, Chicago, Minneapolis, and Duluth. At these latter

markets it is not only stored, but is also cleaned, clipped and given other treatment not so readily afforded at the interior points, and much of it is milled. From these markets it and its products are sold according to the vagaries of domestic and export demand and supply.

Under these conditions of marketing the final destination of a shipment of grain can not ordinarily be known when it first moves into a market for storage, treatment, or milling. Therefore, the local rate applicable to that point is collected. But the reshipment to final destination of grain so transited is made upon a proportional rate, or transit balance of a one-factor through rate, instead of upon the local rate from the intermediate point to destination. And, since identity of grain can not ordinarily be preserved, the transit provisions in the tariffs make such proportional rates or transit balances applicable to the reshipment upon presentation of inbound freight bills for an equivalent tonnage of grain.

Numerous investigations by the Commission have demonstrated that the practice of according "transit" is not only not unreasonable but that in connection with the transportation of grain it is a necessity and that it does not result in discriminations that are undue[1]—at least not when shorn of

[1] The substance of "transit" (namely, as considered apart from incidental terminal service, back haul, and other extra service) is the through basis of rates lower than the locals (*A. T. & S. F. Ry.* v. *U. S.*, 279 U. S. 768, 779–780), and the question of unreasonableness, or undueness of discrimination

abuses that have attached themselves thereto. The privilege is open to all shippers of grain and all either avail themselves thereof at one time or another or receive benefit therefrom in one way or another. Its working is to diffuse small mills all over the country and it is an important factor in enabling the marketing of grain at a profit. The practice has become universal and it has proved beneficial to the producer, the railroads and the public.

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is administrative (Sec. 15 (1), I. C. Act, as amended by Hepburn Act, 1906, to include word "practice"; *Oregon R. R. Comm.* v. *Oregon Short Line*, 23 I. C. C. 151, 173; *U. S.* v. *L. & N. R. R.*, 235 U. S. 314, 320; *Central R. R. Co.* v. *U. S.*, 257 U. S. 247, 257). Analogous thereto is the common practice of classifying import rates on a lower basis than domestic despite the fact that there is no such singleness of rail and ocean hauls as would make the unit per mile costs of the rail carriers progressively decrease with the distance for the whole movement. All elements that affect the welfare of the carriers and public must enter into an administrative determination as to the justness of that practice. (*Import Rate Case*, 162 U. S. 197, 219.) The similar practice in respect of transited grain finds even more justification because of the circumstances peculiar to its transportation and marketing and benefits to carriers and all concerned; always provided that it is reasonably restricted and properly policed.

Alleged unlawful practice Transportation Grain, 7 I. C. C. 240; *Substitution Tonnage*, 18 I. C. C. 280; *Blodgett Mill Co.* v. *C. M. & St. P. Ry.*, 23 I. C. C. 448; *Transit Case*, 24 I. C. C. 340; *Wichita Bd. of Trade Case*, 29 I. C. C. 376; *Mississippi R. R. Comm.* v. *A. & V. Ry.*, 93 I. C. C. 435, 439; *Lathrop-Marshall Co.* v. *C. & N. W. Ry.*, 144 I. C. C. 227; *Okla. Comm.* v. *Abilene & S. Ry.*, 148 I. C. C. 316, 321.

In addition to grain, a variety of other traffic is accorded the transit privilege:

But many incidental practices had grown up around the privilege of "transit," such as successive "free stops," "back-hauls," "out-of-line hauls" and the "unit rule," all above described. And, too, the dual system of charging both proportional rates and transit balances from primary markets had grafted itself on to the grain rate structure.

The important grain markets are such by reason of basic natural and economic forces (R. 152), including their locations with relation to the grain fields, to the large consuming centers and particularly inbound and outbound channels of transportation. The transportation history of these markets has been one of intensive carrier competition for the outbound movements of the grain and its products after "transit," and the proportional rates from these markets are mainly the result of this competition.

Some carriers operated from the markets, whose lines did not reach through to the grain origins.

Wool Rates, 91 I. C. C. 235, 284; *Cowan* v. *Bond* (Cotton), 39 Fed. 55, 2 I. C. C. 542; *Montgomery Cotton Exch.* v. *L. & N. R. R.*, 112 I. C. C. 325, 333; *Miss. R. R. Comm.* v. *A. & V. Ry.*, 89 I. C. C. 47, 53; *Central Yellow Pine Assn.* v. *V. S. & P. Ry.* (logs), 10 I. C. C. 193, 214; *North Packing Co.* v. *Dir. Genl.* (live stock), 104 I. C. C. 607; *Indianapolis Freight Bureau* v. *C. C. C. & St. L. Ry.* (Steel Fabrication), 15 I. C. C. 370.

But transit is allowed only where the necessities of the particular commodity justifies it. There is a limit to the commodities that can be reasonably granted the privilege. *Douglas & Co.* v. *C. R. I. & Pac. Ry.*, 16 I. C. C. 232, 244.

To secure a share of the outbound business they published proportional rates equal to the rates or transit balances of carriers whose lines extended from the grain origins to the primary markets and beyond. (R. 85.) These latter carriers made applicable through the markets from many origins lower through rates with lower transit balances, varying with origins. (R. 86 to 89.)[10] So that at the time of the hearing all carriers serving the primary market had on file proportional rates (R. 85), but these had "come largely into a state of disuse" (R. 89) because of the lower transit balances applicable from most origins (R. 86–89).

As to the level of the rates, their relation to each other and to other "descriptions of traffic," the Commission stated that the relation of rates, as well as the general level was within the scope of the investigation; that the record required a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well (R. 81); that the average "present rates" on grain and grain products differ "not only in general territories but in different localities in the same general territory" (107); that such particular rates vary between a range of 57

[10] The graphic example portrayed in *A., T. & S. F. Ry. Co. v. U. S.*, 279 U. S. 768, 772, is illustrative of the manner in which a rate over a direct route is made applicable over an indirect route through a primary market, leaving a transit balance lower than the proportional rate.

to 149 per cent of the scale prescribed in *Oklahoma Millers League* v. *A. & M. R. R.*, 128 I. C. C. 523, "using that as a convenient yardstick" (R. 107 to 109); that many rates are too low, others too high, and relative rates not in entire accord with transportation conditions; "that contributing to these variations are Canadian competition, State regulation and our own revisions [11] in certain territories"; that horizontal treatment of existing rates would perpetuate these inconsistencies and that some rates should, therefore, be reduced, some increased, and some left unchanged (R. 109).

The Commission's order of July 1, 1930 (R. 273) prescribed as maxima certain rates set forth in Appendix D (R. 244) of its report and required the carriers to desist from, and to observe, practices as provided in findings contained in the report.[12]

Appendix D specified the levels of several thousand rates between so-called key points and the carriers were directed to observe them as maxima in reconstructing their tariffs and to establish rates between other points in reasonable relation to the key-point rates. (R. 111.) The appendix also set

[11] On such widely produced commodities as grain experience has proved that adjustments should be territorial because lesser adjustments can not comprehend all rate relationships involved and merely serve to disturb, without correcting, the situation as a whole.

[12] Following the usual custom, the Commission's order referred to and made the report a part thereof. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 626.

forth so-called interior scales for application as maxima where no other rates were prescribed either specifically or by reasonable relation. (R. 111.) In connection with the rates so prescribed the Commission required that rates on coarse grains, which theretofore had been 90 per cent of the rates on wheat except in territory west of the Rocky Mountains and in Illinois, should take the same rates as wheat throughout the territory involved. (R. 101, 102.) It also required that free stops in transit should be limited to a maximum of two (plus one inspection), other stops to be paid for at the rate of 2 cents per 100 pounds [13]; and that there should be uniformity in this, including the Northwest; that there should be reasonable limitations of out-of-line hauls and back-hauls; that the unit rule and other transit provisions which served as a basis for unreasonable requests for transit should be eliminated. (R. 104, 107); that the carriers desist from the practice of contemporaneously charging both proportional rates and transit balances from the primary markets and the one method only of constructing rates on said markets be continued, namely, the separate inbound rate [14] and the proportional rate beyond. (R. 95.) This latter was done, not only to remove discriminations caused

[13] The service involved in transit stops is described in concurring opinions and each stop estimated to cost $20. (R. 149, 193, 184.)

[14] The inbound rate might be a proportional in the case of a shipment which, after transit at one primary market, moved on for transit at another primary market.

by the dual system of proportional rates and lower transit balances (R. 91, 95) and to prevent abuses in tariff practices (R. 94), but also to preserve the carriers' revenues (R. 93, 193).

For the bulk of the traffic outbound from the primary markets moved on transit balances much lower than the proportional rates, and it was the Commission's belief that the discontinuance of transit balances, much lower than the proportionals, would not only preserve "but would substantially increase carriers' revenues, even with substantial reductions" in the combination rates on the primary markets. (R. 93). In this connection it should also be mentioned that the Commission prohibited application of the prescribed combination on one primary market through another primary market, whose combination was higher, except in respect of direct shipments without "transit." (R. 95.) This permitted carriers over indirect routes to meet the competition of direct routes, while preventing the prescribed proportionals from being displaced by what would be altogether unreasonably low transit balances.[15]

While the rate changes required by the order were for the most part reductions, many increases

[15] The example cited in concurring opinion of Commissioner Porter of a direct rate on molasses to Chicago which, as applied over an indirect route with transit at Kansas City and in connection with the "unit rule," resulted in a transit balance of nothing on a shipment of mixed feed from Kansas City to Chicago (R. 193) instances the extremes of carrier competition for business.

were also effected, some on wheat but particularly in the rates on coarse grains (R. 191); transit balances from the important markets were supplanted entirely by the higher proportional rates, which had theretofore been largely subordinated to the transit balances; and great economies in transportation under the prescribed rates may reasonably be expected to follow from the restrictions imposed upon the carriers' transit practices, i. e., limiting the number of transits without separate charge and the direction to the carriers to restrict out of line and back hauls (R. 149, 193).

The Commission's supplemental report and order, 173 I. C. C. 511, was entered April 10, 1931. Thereby certain "findings in the original report were clarified in some instances and corrected and modified in others." (R. 275.) Some modifications were made in rate levels theretofore prescribed to bring them into better relation with other rate levels, or to avoid violations of the 4th section of the Act. Notably, the proportional rate from Minneapolis to Chicago was increased from 11 to 12 cents per 100 pounds, and that from Minneapolis to Duluth from 4.5 to 5.5 cents (R. 292, 293); a regrouping was prescribed in rates from Montana points to Portland and Seattle, Minneapolis and Duluth, and to California points, which resulted in some increases and some reductions (R. 303, 304; and permission was given to establish a minimum rate of 10 cents into the primary markets both in connection with the interior scales and

the flat rates prescribed (R. 288, 289, 292). Under the interior scales the theretofore minimum had been 6 cents and the prescribed flat rates had, for some distances, been less than 10 cents.

As said by Commissioner Meyer, the Commissioner in immediate charge of the case:

> The record in this case for the first time presents a complete view of the existing grain rates in western territory and places before us facts upon which a revision may be attempted. * * *
>
> The report sets up a revised grain-rate structure which I believe experience will demonstrate to be an improvement over that which now exists. The new structure is not a glorified distance scale nor a symmetrical geometrical figure. It is a system of functionally related rates which fit the grain business as described in this record. (R. 150.)

The case was submitted July 1, 1929, and the first report and order were issued July 1, 1930. (R. 69.) The supplemental report and order were entered April 10, 1931. (R. 275.) The latter, in addition to making the changes heretofore mentioned, denied various petitions for rehearing, reargument, and reconsideration. (R. 280.) The original order was to have become effective October 1, 1930. "Because of the mechanical difficulties involved in the preparation and printing of the numerous tariffs containing the hundreds of thousands of rates to be revised" (Appellant's Brief 123), the effec-

tive date was thereafter postponed from time to time; and the supplemental order fixed June 1, 1931, as the date upon which the order in the case, as thereby corrected and modified, should become effective (R. 325).

2. Proceedings in the District Court

April 29, 1931, appellant railroads filed their petition to enjoin the Commission's orders. (R. 4.) April 30, 1931, appellant, Terminal Grain Company et al., filed their petition for the same relief. (R. 611.) May 7, 1931, the lower court ordered that the two cases so instituted be consolidated. (R. 628.) The petitions did not challenge the validity of the Commission' orders on the ground of lack of supporting evidence (R. 696) and the record made before the Commission was not introduced in the suit. May 6 and 7, 1931, the consolidated cases were argued and submitted on applications for restraining order and preliminary injunction. May 7, 1931, the lower court issued a restraining order staying the Commission's orders 60 days to enable it to determine the legal questions presented. (R. 658.) July 7, 1931, said court entered its order vacating said restraining order and denying the application for preliminary injunction (R. 708), and from said order appellants have taken this appeal (R. 709).

SUMMARY OF ARGUMENT

1. The Commission's orders were not based upon a misconception of powers under the Hoch-Smith

Resolution similar to that contained in *Ann Arbor R. R.* v. *United States*, 281 U. S. 658. Its report in this case after making express mention of that decision declares that "the findings herein are under the provisions of the Interstate Commerce Act." Appellants attribute to certain language of concurring commissioners in separate opinions the same misconception of power as prior to this court's said decision and then in turn attribute to the Commission's report what they read into the language of said separate expressions. But the possibility of such strained implication is refuted by the Commission's statement, in substance, that it had in contemplation this court's decision and was following its teachings.

The Commission's statement of the issues to be determined and the findings made upon those issues do not support appellants' contention that the Commission proceeded under its former conception of the Hoch-Smith Resolution, but instead constitute positive substantiation of its statement that its determination was reached under provisions of the Interstate Commerce Act.

The general increases in coarse grain rates over wide area, and the increases in some wheat rates are not reconcilable with appellants' assumption that the purpose was to treat agricultural products as a favored class pursuant to its former conception of the Hoch-Smith Resolution.

The fact that the general adjustment of rates on grain and its products, made in this case throughout western territory, effects changes in rates recently prescribed as reasonable in other cases lends no support to appellants' contention that the Commission did not base its action on provisions of the Interstate Commerce Act. The task of the Commission was a reconstruction of rates throughout the territory west of the Mississippi and Illinois, involving not only the level but the relating of the thousands of rates to each other. Moreover, the former line-haul rates covered far more service in that under the prescribed rates the Commission has put a stop to wasteful practices by limiting free stops to two, all others to be charged for; in that it has abolished the wasteful and unreasonable "unit rule"; in that it has generally condemned unreasonable "back-hauls," "out-of-line-hauls," and unreasonable use of circuitous routes; and in that it has required construction of rates on primary markets by flat inbound rates and proportional outbound rates exclusively, thereby eliminating the wasteful and discriminatory dual system of proportional rates and much lower transit balances.

2. Appellants' position that the Commission did give consideration to section 15a is correct; their statement that the Commission's duties under section 15a are to be performed in the carrying out of

its power to prescribe just and reasonable rates is a correct statement of the law. The Commission so interpreted section 15a and its findings and order were made pursuant thereto.

That the Commission gave careful consideration to the maintenance of an adequate transportation system is evidenced not only by its many requirements looking to economical management, that is, to the elimination of waste under the line-haul rates, but also by the fact that the increases in coarse grains over wide areas went to carriers shown to be in special need thereof, and that the so-called wheat carriers were in far better financial condition.

Appellants' contention that the Commission reached its determination under a supposed duty to favor agricultural products instead of in the exercise of its power to fix just and reasonable rates is (as under all chapters of their brief) incorrect.

The Hoch-Smith Resolution, paragraph 2, makes it the duty of the Commission to reconstruct the country's rate structure, and although final valuations are not available as yet, the Commission is to the best of its administrative ability accomplishing its task, giving full force to the purpose of the Transportation Act to maintain and promote an adequate transportation service.

8. There were absolutely no irregularities in the Commission proceedings.

4. There was no abuse of discretion by the Commission in declining the several motions for rehearing and reconsideration. Sound reasons must appear for rehearing of a proceeding of this kind, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned for rehearing on the same ground of alleged changed conditions. The needs of the carriers for general emergency relief was not special reason for reopening a particular docket submitted after long drawn-out proceedings, for purpose of giving effect to temporary conditions.

5. No issue is raised that the orders are unsupported by evidence.

ARGUMENT

I. THE COMMISSION DID NOT BASE ITS ORDERS UPON A MISCONCEPTION OF POWERS CONFERRED UPON IT BY THE HOCH-SMITH RESOLUTION SIMILAR TO THAT CONDEMNED IN ANN ARBOR R. R. v. UNITED STATES, 281 U. S. 658

As has been shown in the preliminary statement, the issues involved in the Commission proceeding were whether the rates involved were unreasonable, whether they were unduly preferential and prejudicial in their relation to each other or to the rates on other classes of traffic and whether certain practices under the rates were unreasonable or unduly preferential and prejudicial. In

the action taken upon those issues, the following provisions of the Interstate Commerce Act were immediately involved:

> SEC. 1 (5).—All charges * * * shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful.
>
> SEC. 3 (1).—That it shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person * * * or locality, or any particular description of traffic * * * or to subject any particular person * * * or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage.
>
> SEC. 15 (1).—That whenever, after full hearing * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge * * * or that any * * * regulation or practice * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate, fare, or charge * * * to be thereafter observed in such case * * * and what * * *

> regulation or practice is or will be just, fair, and reasonable, to be thereafter followed * * *.

Consideration also had to be given to the provisions of section 15a, which will be set forth and discussed in a later chapter devoted to that section.

The Commission determined that the rates and practices were unreasonable and in some particulars unduly preferential and prejudicial, and determined and prescribed the just and reasonable rates and practices to be thereafter observed.[16] In *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; the court in announcing the familiar rule governing review of Commission orders, said:

> In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. * * * the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

In the present case the petitions contained no allegation that the order was unsupported by substantial evidence (R. 696); "nor could a claim that the order was unsupported by evidence" have been insisted upon, since the evidence taken before the Commission was not introduced. *Louisiana &*

[16] To be more fully given in next chapter.

Pine Bluff Ry. v. *United States*, 267 U. S. 114, 116; *United States* v. *Tennessee*, 262 U. S. 318, 323, 324; *Spiller* v. *A. T. & S. F. Ry.*, 253 U. S. 117, 125. It follows that there was left for the lower court's "consideration only such legal questions as arise upon the face of the report, the order, and the pleadings." (R. 609.) It further follows that this appeal presents only the question as to whether the lower court was wrong in not holding that the Commission had exceeded its authority. Principally appellants rely upon the contention that the lower court erred in not reaching the conclusion that the Commission had based its order upon a misconception of its powers under the Hoch-Smith Resolution similar to that condemned by this court in *Ann Arbor R. R.* v. *United States*, 281 U. S. 658, hereinafter referred to as the *Deciduous Fruit Case*.

The Commission's order involved in that case was entered in a proceeding instituted by the California Growers and Shippers Protective League assailing rates on deciduous fruits from California to eastern destinations as unreasonable and unduly preferential under Sections 1 and 3 of the Interstate Commerce Act "and having an unjust and unreasonable basis and being too high within the meaning of the Hoch-Smith Resolution." In the suit brought by the carriers the validity of the order was challenged upon the ground, among others, that it was based upon a construction of said resolution which was inadmissible.

In upholding the carriers' contention this court pointed out, among other things, that the Commission report stated that the primary issue to be determined was whether the existing rates were in accord with the Resolution; that the Resolution effected a change in the basic law; that this change operated to eliminate a decision between the same parties wherein the Commission had found the same rates neither unreasonable nor unduly preferential; and that while it said the existing rates were unreasonable, the report as a whole shows this means they were deemed unreasonable under the joint resolution when construed as the Commission construed it, and not that they were deemed unreasonable or unduly prejudicial or preferential under Sections 1(5) or 3(1) of the Interstate Commerce Act.

Thereafter the court discussed the three paragraphs of the Hoch-Smith Resolution in their order:

The first paragraph declares it to be the true policy in rate making that the conditions prevailing at any time in the several industries shall be considered in so far as it is legally possible to do so, to the end that commodities may move freely. It was held that "this policy is not new."

The second paragraph directs the Commission to make a thorough investigation of the country's rate structure in order to determine whether existing rates are unreasonable, or unduly discriminatory as between various localities and parts of the country

and various classes of traffic, and to make in accordance with law such adjustments as may be found necessary to correct any defects found to exist. In making such adjustment the Commission is directed to give due regard, among other factors, to the general and comparative levels in market values of the various classes and kinds of commodities as indicated over a reasonable period of years, to a proper and natural development of the country as a whole, and to the maintenance of an adequate transportation system. The court's decision said that this paragraph "is devoted chiefly to requiring the Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws such as Sections 1(5) and 3(1) of the Interstate Commerce Act * * *"; that those factors, particularly called to the Commission's attention, are matters that "have all been regarded as factors requiring consideration under existing laws. * * * And what is said about the maintenance of an adequate transportation system is but a reiteration of provisions embodied in existing laws."

The third paragraph, as immediately pertinent, reads:

> In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the prod-

> ucts of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service; * * *.

The court pointed to this paragraph as the one which the Commission's report showed that it construed as making a change in the "basic law," as placing agricultural products in a most "favored class," as justifying a reduction in rates thereon, notwithstanding most of the carriers "have not as yet made the fair return" for which Section 15a. provides as a means of securing the maintenance of an adequate transportation system, and as requiring it to condemn the rates as unlawful although independently of the paragraph, they must have been upheld as lawful under the applicable sections, 1 (5) and 3 (1), of the existing law. The court held:

> We are of opinion that the Commission's construction can not be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

The above holding could not be more plainly stated. Furthermore, the court went on to point to the language principally responsible for the con-

struction given to the paragraph by the Commission; it said:

> The paragraph requires only that "lawful changes" in the rate structure be made; and we find in it no sanction for any other change * * *.
>
> The Commission stresses the concluding words in the same sentence with "lawful changes" and evidently regards them as qualifying the natural import of the latter and in effect specifying a new and reduced scale to be applied in rate making. * * *
> The words stressed are "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The decision held that considering the connection in which these words are brought into the sentence they fall much short of supporting the Commission's construction; that while they should not lightly be disregarded, neither should they lightly be accepted as overturning unambiguous provisions of existing law that reflect a settled legislative policy; that

> If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system, they work no change in the existing law. But if they mean more and are intended to require that rates be reduced to some uncertain level below that standard,

> they give rise to a serious question respecting the constitutional validity of the paragraph of which they are a part. * * * By reason of their uncertain meaning * * * and of the constitutional question * * * we think they must be held to work no substantial change in the meaning or operation of Sections 1 (5), 3 (1), and 15, par. (1), of the existing law.

The Commission had the above plain statement of the law which it administered before it when it issued its orders, here under attack. In its report the Commission said:

> The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*, — U. S. —, decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act.

The lower court aptly characterized the above as a statement by the Commission that it had in contemplation the holding of this court in the *Deciduous Fruit Case* and that it was following the teaching thereof. (R. 705.) Appellants are here stressing numerous reports of the Commission rendered before the decision in the *Deciduous Fruit Case* was handed down (R. 45, 46; *Muller Case*, 151 I. C. C. 787; *Ogden Grain Cases*, 126 I. C. C. 255; *So. Carolina Asso.* v. *Aberdeen R. R.*, 152 I. C. C. 5), for

the purpose of showing that the Commission, in reaching its present determination, was still proceeding under its earlier construction of the resolution. For much the same purpose they are even referring to the Commission's decision in the *Deciduous Fruit Case,* reversed by this court. The need for the statement by the Commission that it was following the teaching of the court arose from the very fact that it had theretofore given to the resolution an interpretation different from that of the court.

Furthermore, appellants refer to language in concurring opinions of certain commissioners (Br. 70 to 73, 103, 104) as showing that they were still regarding agricultural products as favored commodities and fixing rates on the "lowest possible lawful" basis in the sense condemned by this court in the *Deciduous Fruit Case* (71) and, in effect, that such basis was adopted by the Commission as a whole since "there is nothing in the main report to the contrary" (Br. 104, 73). In answer to the same contention made below, the lower court said:

> But here we are met with the unconditional statement in the report that the Commission had in contemplation the holding of the Supreme Court in the *Ann Arbor Case* and that it was following the teaching thereof by making its findings under the law instead of under any alleged wrongful standard of the resolution. Furthermore, this statement, adopted by the complete Commission is effective refutation of plaintiff's contention that

certain individual members' statements, alleged to be indicative of a desire to adopt a standard other than the lawful one, went unchallenged." (R. 705.)

Moreover the lower court was unable to conclude that any words in said separate opinions had reference to other than lawful rates as defined in the *Deciduous Fruit Case*. In light of the fact that the decision in that case had, as shown above, particularly said that the words "lowest possible lawful rates" should be taken to mean no more than that the depressed condition of agriculture should be given such consideration as may be reasonable considering the nature and cost of the service and the need for maintaining an adequate transportation system, the argument of appellants that those words, or similar words, as appearing in the separate opinions referred to, were used in any other sense is unwarranted.[17]

The holding by this court in the *Deciduous Fruit Case* that the Hoch-Smith Resolution does not purport to make unlawful any rate, which under the existing law is a lawful rate, was plain. The Commission's statement of that holding and that it was making its determination under the Inter-

[17] A quotation from the separate opinion of Commissioner Meyer appears at the top of page 104 of Appellants' brief. To avoid possible misunderstanding the Court's attention is called to the fact that the rates referred to in the first two sentences of that quotation are export rates which the carriers some years ago voluntarily established in aid of a national program to reduce the surplus of wheat. This appears in the complete sentence from which the quotation is taken. (R. 153.)

state Commerce Act, was equally plain; and, as said by the lower court, it was unconditional. Even disregarding that express statement there is nothing in the report which suggests that any other standard had been followed. The then-existing rates and practices were found unreasonable and in some respects unduly preferential and prejudicial. The just and reasonable rates and practices were prescribed for the future.

Having attributed to said concurring commissioners the use of the "lowest possible lawful rate" basis in the sense condemned by this court, and then, having assumed that basis to have been adopted by the report despite its express disclaimer, page after page of appellants' brief, and its headnotes, thereafter refer to the rates as having been made on such basis. And thus, having thrust upon the Commission an already condemned standard of rate making, much of appellants' argument is that its use in connection with provisions of the Interstate Commerce Act is unlawful; that is, that the resolution made no change in the standards of fixing rates under the Interstate Commerce Act, whether for products of agriculture or other commodities, a matter already determined by this Court and the determination given express recognition in the Commission's report.[18]

[18] Appellants state that it is their understanding (R. 21) that Commission counsel took the position in the court below that under the Interstate Commerce Act and by direction of the Hoch-Smith Resolution the Commission was empowered to prescribe "the lowest possible lawful rates." The Commission's position below was the same as shown in it report and as taken here.

There are, it is true, two other contentions which are advanced to show that the Commission proceeded under its former conception of the Hoch-Smith Resolution rather than under the Interstate Commerce Act, namely, that its findings and the changes made in the rates are reconcilable only with the conclusion that it acted under powers conceived to flow from the resolution. But these are the very matters to which the Government and the Commission refer the Court in substantiation of the statement in the Commission's report that "The findings herein are under the Interstate Commerce Act."

A. The Commission's statement of the issues to be determined and the findings made upon those issues are responsive to applicable provisions of the Interstate Commerce Act and neither they nor any discussions in the report suggest that other than the usual standards of rate reasonableness and relations entered into the determination

We do not understand that appellants allege the orders to be invalid for lack of precise findings (Br. 76) in respect of what they themselves refer to as the "hundreds of thousands of rates" (Br. 76) involved, but rather that they contend that there is an absence of findings usually made in a case under the Interstate Commerce Act and that that fact "coupled with the presence of certain other findings, are persuasive that the order was

made either in response to a duty supposed to have been created by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed." (Br. 44.)

The certain other findings referred to relate to the condition of agriculture. There is, as stated by appellants, a summary of the condition of agriculture attached as an appendix to the report. There appears to be no good reason why it should not have been, since the "conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry." *Deciduous Fruit Case,* 281 U. S. 658, 666. The consideration given this factor in the report is a half page statement of what the summary in the appendix covers, concluding with the statement that "while conditions affecting the grain farmer had been improving within the few years immediately preceding the hearing herein there is still depression in the grain industry." (R. 76, 77.) And there is the further statement later on in the report that "The effect upon the producer of any change in rates is more or less speculative, but the record seems clearly to indicate that any substantial benefit to the producer would more likely come from a reduction in the inbound rate than from any other

revision." (R. 93.) These are the only findings as to agriculture in the report itself.

The Commission's report stated that the question presented was whether under present conditions the rates on grain and grain products throughout the Western District are reasonable and just and are properly related to each other and to the rates on other traffic (R. 77); that the record requires a general survey of the rates on grain and grain products throughout the Western District from the standpoint not only of cost but of general transportation conditions as well; that the relation of rates as well as the general level is within the scope of the investigation; that it will be necessary to discuss general marketing conditions in their relation to rates (81), to take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord the carriers a rate of return contemplated by law, including section 15a of the Act (77).

The Commission discussed five separate cost studies and analyses, one of which was prepared by the Chief of the Commission's Bureau of Statistics, not as an official document but as an expression of individual view. This covered operations of all carriers in the Western District, and in Illinois, Wisconsin, and Minnesota. One of the remaining

four studies was prepared on behalf of Kansas farm organizations and the remaining three by State commissions.

As to four of these studies the Commission said the final showing was of a distance scale purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a 6 per cent return on that part of the property assignable to the movement of wheat, and purporting to show also that rates could be materially reduced from a standpoint of cost of service; that the study of the Oregon Commission (confined primarily to intrastate shipments) purported to show that rates on wheat in Oregon might be substantially reduced; that the cost formulas themselves recognize that the cost of transporting grain other than wheat, as well as flour and other grain products, which load substantially lighter than wheat, is greater than the cost of transporting wheat; that it will be understood that under the theory of these analyses the showing as to any grain or grain product will be duplicated as to any other commodity of the same loading irrespective of relative values and densities of tonnage; that the distance scale makes no provision for competitive routes of varying mileage or for differences in character of country, density of traffic, or other incidents of transportation, and that in order to compensate for these contingencies the scale would have to be in-

creased; that the contention is not advanced in connection with any of these analyses that rates should be based solely on cost of service; that it was not denied by the proponents that other than costs should also be given consideration in connection with the determination of a reasonable basis of rates on wheat; and that the proposed distance scales merely represented, as already stated, levels of charge that would not be considered too low from the standpoint alone of cost of service plus a 6 per cent return on investment. (R. 79 to 81.)

The Commission's report sets forth a table showing separately for each of the years 1921 to 1928 the percentages of return on book investment for the carriers of the Western District. For 10 specified railroads having 75 per cent or more of their mileage in Western Trunk Line Territory the average rate of return on book value was 2.97 per cent in 1927. In that year the table shows that for all railroads in the Western District the percentage was 3.92. The report then discusses the percentages of return of certain named railroads for that year, and sets forth the amount by which said roads were short of making a 5.75 per cent return for the 7 years following Federal control, and separately for the year 1927. The report's showing in respect of return on investment will be more fully discussed in a later chapter. Thereafter the report sets forth tables showing grain

and grain products revenue percentage of total revenues in 1924, grain and grain products percentage of total tonnage for various years, and certain other tables. In the text of its report the Commission said "For the calendar year 1927 on Class I railways of the Western District grain and grain products constituted of the total traffic 11.60 per cent of tons originated and 10.12 per cent of tons carried, including tonnage from connections." (R. 77 to 79.)

Subsequently the report contains a discussion of the wheat crop of the country and trend of movement, methods of rate-making and the history thereof, and, of particular importance in connection with the Commission's determination in the case, discussion of abuses shown to have grown up in connection with transit. (R. 81 to 99.)

The Commission's investigation showed that many wasteful and discriminatory practices existed in connection with transit services.[10] It found that free stops in transit should be limited to a maximum of two (plus one inspection), other stops to be paid for at the rate of 2 cents per 100 pounds; that there should be reasonable limitations of out-of-line hauls and back hauls; that the unit rule and other transit provisions that served as a basis for unreasonable requests for transit should be eliminated; and that present practices were un-

[10] It is estimated in a concurring opinion that the cost to the railroads of this transit service is approximately $30,000,000 per annum. (R. 149.)

reasonable, unduly preferential and prejudicial to the extent that they do not conform to the foregoing. (R. 104–107.) As to the method of constructing rates, the Commission found that the carriers' practice of contemporaneously charging both proportional rates and transit balances from the primary markets was unreasonable and unduly preferential and prejudicial. (R. 95.) In this connection, too, it found that said dual system was open to question from the standpoint of orderly tariff procedure (94) and was wasteful of carrier revenue (93). The Commission found "that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled." (R. 95.) In this connection the Commission stated that "It is believed that making rates through primary markets exclusively by combination of flat rates to and proportional rates from the markets, would not only preserve but would substantially increase carriers' revenues, even with substantial reductions in both the inbound flat rates and the outbound proportionals, because of the discontinuations of transit balances much lower than the proportionals * * *" (R. 93.)

As to the level of the rates, their relation to each other and to other descriptions of traffic, the Commission found the average present rates on grain

and grain products differ not only in general territories but in different localities in the same general territory (107); that such particular rates varied between a range of 57 to 149 per cent of the scale prescribed in *Oklahoma Millers League* v. *A. & M. R. R.*, 128 I. C. C. 523, using that as a convenient yardstick (R. 107 to 109); that many rates are too low, others too high, and relative rates not in entire accord with transportation conditions; that contributing to these variations are Canadian competition, state regulation and our own revisions in certain territory; that horizontal treatment of existing rates would perpetuate these inconsistencies and that some rates should, therefore, be reduced, some increased, and some left unchanged. (R. 109.)

The Commission found that rates on coarse grains in the plains states east of the Rocky Mountains, including the southwest, were 90 per cent of the wheat rates; that from a transportation standpoint there is no justification therefor; that coarse grains load lighter than wheat; that perhaps the main argument in favor of the differential is the somewhat lower value; that substantial justice can best be done to shippers of both by one rate [illegible] oth classes of traffic. (R. 102.) The Comm[illegible]n found that the rates on flour are the same as on wheat except between certain parts of the Mountain Pacific group, and from east of the Rocky Mountains to Pacific Coast territory the flour rates are 7

cents higher than on wheat; that the rates on direct products of coarse grains are usually the same as on the coarse grains from which the products are made. After discussion of the reasons advanced for and against a differential on grain products, the Commission found that rates on wheat and on coarse grains and their products are unreasonable to the extent they exceed the rates prescribed in Appendix D. (R. 102, 103.)

The Commission's ultimate finding was that the present rates on wheat and on coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D, to be applied in accordance with previous discussion as to rate-break relationship of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments; that rates from other points to the same destinations are unreasonable to the extent they exceed rates made with reasonable relation to the rates from neighboring key points herein specifically prescribed; that rates between points between which rates have not been prescribed specifically, or by reasonable relation, are unreasonable to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D. Reasonable groupings of origin and destination points will be permitted.

The report further contains many rate adjustments of specific situations not calling for detailed

comment in connection with the issues raised here. (R. 118 et seq.)

The supplemental report issued April 10, 1931, about 9 months after the first report, clarified certain findings and made certain corrections. It also modified certain findings resulting in the rate changes already mentioned in the preliminary statement.

Appellants state that while the Commission gave consideration to the cost studies, it made no finding and treated them as would any tribunal which did not feel that the subject was necessary to a decision. (Br. 43.) But why then did the Commission select these from the 2,100 exhibits for discussion in the limited space possible in a report? This manner of dealing with evidence is not uncommon in Commission reports. For example, in the *Wisconsin Passenger Fares Case,* 59 I. C. C. 391, the Commission said at page 393:

> * * * Evidence offered by the carriers indicates that if the present intrastate fares are continued for one year and if there is the same intrastate travel during that year as in the calendar year 1919, the direct loss to the carriers due to their failure to secure the 20 per cent increase in intrastate fares will approximate $2,400,000, and if the 2-cent intrastate fare should become effective the loss would be approximately $6,000,000.

This statement of what the evidence indicated entered importantly into the decision in *Wisconsin*

R. R. Comm. v. *C., B. & Q. R. R.*, 275 U. S. 563, 566. In the present case the Commission made no formal findings on costs, but there can be no doubt but that it weighed and balanced this evidence with other evidence as clearly indicated in the report. (R. 80, 81.)

The findings above set forth purport only to be a part of the whole, but they are enough to refute the contention that a case under the Interstate Commerce Act is not disclosed. If the appellant's allegation is that the findings on each of the underlying facts entering into the determination are not precisely set forth and for that reason the case must be presumed to have been determined upon the conception that favored treatment should be given agricultural products and not as one under the Interstate Commerce Act, they themselves show that no such presumption can be reasonably entertained.

Since, as conceded by them (Br. 50), the amendment of 1906 to section 14 (1) of the Act dispensed with "formal and precise findings" (*Mfrs. Ry. Co.* v. *U. S.*, 246 U. S. 457, 487), this report is not essentially different in the matter of findings than many other reports of the Commission. As appellants well know, it was issued prior to the Court's admonition in *Beaumont, Sour Lake & W. Ry.* v. *U. S.*, 282 U. S. 74, and, too, the reason for absence of detailed findings is explained by the report itself. Under the heading "General Comment," it is said:

> From what has preceded, it must be obvious that this is an unusual proceeding. It embraces threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance and be treated in a separate report in the customary way. Detailed individual treatment of separate issues in this proceeding would result in a report encyclopedic in size, far beyond the limits of practicability, and require many months of additional time. As a practical matter it has therefore been impossible to discuss all of the facts bearing upon each issue. However, huge as this record is, thorough examination has been made not only of the immediate transcript of some 53,000 pages, but also of the 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums. (R. 147.)

So that any lack of detailed findings are on the face of things accounted for by past custom and the size of the case and afford no warrant whatsoever for the contentions that the Commission reached its determination under the misconception that the Resolution required it to treat agricultural products as a favored class, and afford no excuse for the charge (Br. 44, 60) that it reached its determination out of deference to the wishes supposed to be expressed by Congress in the Resolution.

B. The changes in rates and practices effected by the orders, instead of supporting appellants' position that the Commission proceeded under its former conception of the Hoch-Smith Resolution, afford positive showing that the determination was reached under the Interstate Commerce Act

(1) The general increases in coarse grain rates, the increases in some wheat rates, and the elimination of transit balances outbound from primary markets are not reconcilable with appellants' assumption that the purpose was to treat agricultural products as a favored class rather than to establish reasonable and properly related rates

It will be remembered that the Commission's order required rates on corn, oats, and other coarse grain which theretofore had been 90 per cent of the rates on wheat, except in territory west of the Rocky Mountains and in Illinois, to be made the same as the rates prescribed on wheat. It is not unfair to say that thereby the rates on grain as a whole in the territory east of the Missouri river where coarse grain predominates were increased. Notably was this true of Iowa, Minnesota, Wisconsin, North Dakota, eastern South Dakota, and northern Missouri, where the production of coarse grain predominates. (R. 101, 207.)

This situation may be illustrated by referring to pages 43 and 44 of the supplemental report, which shows that practically every rate on coarse grain is increased from the State of Minnesota to the markets of Chicago, Minneapolis, and Duluth. (R. 317, 318.) When read together with the revised page of the original report, there referred to, many of these increases will be seen to be sub-

stantial. Much the same situation is shown on page 807 of the original report (R. 257) with respect to the rates from Missouri to Chicago, Kansas City, and St. Louis, and on pages 808 and 809 of the original report (R. 258, 259) with respect to the rates from southeastern Missouri to St. Louis and Memphis. On pages 802 and 803 of the report (R. 252, 253) the situation is illustrated as to Iowa, the nation's greatest coarse-grain state. The substantial increases there made in coarse-grain rates to the great grain markets of Chicago, Omaha, St. Louis, and Minneapolis should be particularly noted. On page 818 (R. 268) substantial increases will be found in coarse-grain rates between points in Texas, an important coarse-grain state. Page 812 (R. 262) shows increases in the North Dakota rates. Page 821 (R. 271) shows the increases from Wisconsin to Milwaukee and Chicago. Page 817 of the original report (R. 817) and page 47 of the supplemental report (R. 321) show increases from South Dakota to Chicago and Minneapolis. A small average increase was also made in coarse-grain rates from Kansas points to Kansas City. (R. 254, as corrected by supplemental report R. 313.) Coarse grain is 60 per cent of the total grain crop of Kansas, 55 per cent North Dakota, 86 per cent Nebraska, 90 per cent Minnesota and South Dakota. (R. 101.)

There were some important increases in wheat rates. For example, page 810 of the original report (R. 260) and page 46 of the supplemental report

(R. 320) show an increase to 37½ cents in the export wheat rate of 32 cents from Central Montana to Seattle and Portland. This is an important increase, as will readily be observed from the discussion on pages 692 to 694 of the Commission's original report. Other increases in wheat rates are from North Dakota to Minneapolis-Duluth and to Chicago. (R. 812, 320.) The wheat rates from Minnesota to Minneapolis and Duluth were also increased. (R. 256, 319.)

The increases provided in the Commission's report can not be accurately measured without also considering the limitation to two free stops in transit, the requirement that for each additional stop two cents per 100 pounds shall be charged, and that for all stops of manufactured commodities for storage, including the first two, a charge of 2 cents per hundred pounds for each stop will also be exacted. Coupled with this there are the restrictions in respect of out-of-line hauls, circuitous routes, and back hauls. As has been heretofore said, the terminal cost involved in transit stops is estimated by concurring commissioners at $20 for each stop, and the total annual cost by one commissioner as $30,000,000. A footnote, at page 654, of the original report (R. 104) reads:

> The record describes 30 cars of grain kept in transit in Texas for 100 days, transported 1,500 miles, and finally delivered at a point 300 miles from original shipping point, the peregrinations of these cars including a

virtual shuttle service between Dallas and Fort Worth, to try those markets.

Commenting upon the waste of transportation under existing rates, Commissioner Porter said:

> The most shocking picture of wanton wastefulness in transportation is represented on this record in connection with the so-called free transit. Back hauls of from 50 to 500 miles are common. Devious meanderings of several hundred per cent in circuity are frequent, during which two to a dozen transits are accorded and are accepted as a matter of course. The low proportional rates out of the primary markets are mere paper rates, for little if any grain moves under them. It moves on the balance of the through rate far below any such rates. By the use of the mixing and unit rules it frequently moves out of the large market hundreds of miles for nothing. (R. 193.)

Referring to the same subject, Commissioner Eastman said:

> It is also conceded of record that there have been extensive and extraordinary abuses in transit service, arising chiefly from the competition of carriers for traffic, particularly those with indirect routes. After leaving the farm, grain may be transited several times before it reaches the final destination in the form of some manufactured grain produce, which may even be a neatly packaged cereal breakfast food. And in the course of this oft-interrupted jour-

> ney, it may wander about the country in serpentine fashion. Illustrations are given in the majority report. There may be actual back hauls of many miles. All this is done for the same rate as would be charged if the grain were hauled by a direct route without stop from origin to destination. At times the carrier which hauls the traffic from the transit point, instead of receiving compensation, finds that it has to pay for the privilege. This abuse of transit is especially characteristic of the southwest, and is urged by the carriers of that region as a compelling reason why their grain rates should be relatively high. (R. 159.)

Appellants' statement that the prescribed proportional rates are substantially lower than the proportional rates published in their tariffs is true. But the impression left by their general discussion that the reductions made in proportional rates represent a commensurate reduction in carrier revenue is squarely refuted by the Commission's report, particularly that portion of the report contained under the caption "Wide Use of Transit Balances." (R. 86 to 89.) It is there shown that prior to the grain case the proportional rates from important markets were displaced by lower transit balances, or remainders, of overhead through rates published as a unit and less than the combinations of flat rates to the markets and proportional rates beyond. Typical instances [20] of the wide use of

[20] The Court is respectfully requested to give especial consideration to the eleven instances as set forth in the report.

these transit balances are given at pages 636 to 638 of the report. At page 638 the report states:

> * * * * a substantial, if not the greater, part of the outbound tonnage from the Missouri River to both Chicago and St. Louis pays transit balances less than the proportionals. The same situation largely obtains in respect of shipments outbound from Minneapolis that have been stopped at that market.
>
> To the Southwest transit balances also apply on a substantial percentage of the total traffic beyond Omaha, St. Louis, and Kansas City. *The proportionals from Kansas City to the Southwest appear in fact to be rarely used.* To this territory there is a similar use of the transit balance in lieu of the proportional rate from Cairo, Ill., and Memphis, Tenn.
>
> To the Mississippi Valley, including Memphis and New Orleans, the situation is largely the same. To New Orleans the rates are less than the combinations on Omaha or Kansas City from Nebraska and from parts of northern Kansas. To both Memphis and New Orleans the rates are lower than the combinations on Kansas City *from southern Kansas, and transit balances of these rates from Kansas City and St. Louis afford the only means of those markets reaching the Mississippi Valley with wheat and flour from west of the Missouri River.* The Mississippi Valley adjustment will be referred to in more detail later.

> It will be seen that, because of overhead through rates less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse. * * *"
> (Italics ours.) (R. 88 to 89.)

As an example of the working of transit balances, the flat rate from Altus, Okla., to Kansas City, was 35.5 cents, and the proportional rate from Kansas City to Chicago was 17.5 cents (R. 263, 244) resulting in a combination through rate of 53 cents. The through one-factor rate from Altus to Chicago was 43 cents. (R. 263.) Upon surrender of a freight bill showing an inbound shipment from Altus the reshipment from Kansas City to Chicago could be made at the difference between the rates from Altus to Kansas City and from Altus to Chicago, that is, at the transit balance of 7.5 cents in lieu of the specifically published proportional rate of 17.5 cents.

Appellants' brief refers to a reduction from 28.5 cents to 19 cents in the proportional rate from St. Louis to New Orleans. But the transit balances of overhead through rates less than the St. Louis combination were much less than this proportional rate of 28.5 cents. For example, from Wichita the through rate to New Orleans was 50 cents and the transit balance from St. Louis to New Orleans, after deducting the inbound rate of 31.5 cents from Wichita to St. Louis (combination of 18 cents from Wichita to Kansas City (R. 254) and propor-

tional rate of 13.5 cents beyond (R. 244)), was 18.5 cents.

Appellants refer to a reduction in the proportional rate from St. Louis to Little Rock from 23.5 cents to 10 cents. But the transit balances of overhead through rates less than the St. Louis combination were much less than this proportional rate of 23.5 cents. For example, from Kansas City to Little Rock the through rate was 26.5 cents and the transit balance from St. Louis to Little Rock, after deducting the inbound rate of 13.5 cents from Kansas City to St. Louis, was 13 cents. (R. 244.)

The proportional rate of 17.5 cents from Omaha to Chicago applied with transit at Kansas City, and yielded a transit balance of 9.5 cents, after paying initially the proportional rate of 8 cents from Omaha to Kansas City. (R. 88.) The new adjustment prescribed will result in a rate of 21 cents for the same service; namely, the combination of the prescribed new proportionals of 6 cents from Omaha to Kansas City and 15 cents from Kansas City to Chicago. (R. 244.)

Referring to example 6, on page 637 of the report (R. 87) shipments from Omaha through Minneapolis to Chicago were charged, not the combination of proportional rates of 16.5 cents from Omaha to Minneapolis and 13 cents from Minneapolis to Chicago, but the proportional rate of 16.5 cents from Omaha to Minneapolis plus an arbitrary of 11 cents from Minneapolis to Chicago on shipments to Chi-

cago proper, and plus an arbitrary of 8 cents from Minneapolis to Chicago on shipments to Chicago destined to points east of the Indiana-Illinois State Line. The new adjustment requires that on shipments from Omaha to Chicago, reshipped from Minneapolis, the combination of proportional rates will apply in all instances, and the effect will be to give to the carriers 12 cents, the new proportional rate, on all shipments from Minneapolis to Chicago, whether to Chicago proper or to points east of the Indiana-Illinois State Line.

The point to be emphasized is that, under the prescribed adjustment the proportional rates, and not the previously existing lower transit balances, will apply on all reshipments from the markets.

Referring back to the general increases in rates on coarse grains over a large and predominantly coarse-grain territory, and to the above-mentioned increases in rates on wheat, it seems clear that this action is positive refutation of appellants' charge that the Commission's purpose was to treat agricultural products as a favored class rather than to fix reasonable and properly related rates under the Interstate Commerce Act. The elimination of transit balances lower than the proportional rates outbound from primary markets is persuasive to the same effect although from a somewhat different angle.

The Commission said that it believed the making of rates exclusively by combination of inbound

rates to and proportional rates from the market would not only preserve but would substantially increase carrier revenues even with substantial reductions in the present inbound rates and outbound proportionals because of the discontinuance of transit balances much lower than the proportionals. (R. 93.) Unquestionably the Commission's action in terminating the competitively wasteful and discriminatory dual system of proportional rates and much lower transit balances from the important markets and requiring the application in all instances of the proportional rates from those markets is one of the outstanding constructive accomplishments of its order; and that action was plainly for the purpose of protecting carrier revenues from wasteful competitive practices and stopping unjust discriminations resulting therefrom.

(2) The fact that the general adjustment of rates on grain and its products made in this case throughout western territory effects changes in rates recently prescribed as reasonable in other cases, lends no support to appellants' contention that the Commission did not (as stated by it) base its action on the provisions of the Interstate Commerce Act

As heretofore said, the Commission's report, after mention of the holding of the Supreme Court in the *Deciduous Fruit Case, supra,* that the Hoch-Smith Resolution set up no standard of rate reasonableness, or rate relationship, other than that already provided for by the Interstate Commerce Act, expressly states that: "The findings herein are under the provisions of the Interstate Commerce Act." In further dispute of this statement

by the Commission as to the basis of its action, appellants point to certain reports issued prior to this court's decision in the *Deciduous Fruit case, supra.*

Appellants state (Br. 63) that among the existing rates approved or prescribed during the pendency of this proceeding, are (1) the rates from southern Idaho to Pacific Coast ports and to points in California and Arizona, prescribed in *Ogden Grain Exchange* v. *Arizona Eastern R. R. Co.*, 126 I. C. C. 255, 128 I. C. C. 490, 132 I. C. C. 46, and (2) those from points in Utah, Idaho, Montana and Wyoming to points in Colorado, prescribed in *Ogden Grain Exchange* v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691. Appellants argue therefore that the reductions required in this case in the rates previously prescribed in those cases, were made in furtherance of a reserved jurisdiction to prescribe lower than reasonable rates pursuant to a supposed duty to favor the products of agriculture.

As to the first of these cases, 126 I. C. C. 255, appellants have correctly stated that the rates previously prescribed therein are reduced by the order in this case, but appellants erroneously measure the effect of the latter order solely by a comparison of rates without also comparing the services authorized in connection with the compared rates. The former order permitted an unlimited number of stops for

transit without additional charge, contained no prohibition against carriers retaining unduly circuitous routes, and did not restrict wasteful out-of-line and backhauling arrangements, whereas the order in this proceeding permits but two free transit stops without additional charge and prescribes a charge of 2 cents per 100 pounds for each transit in excess of two, and requires a separate charge for all stops of manufactured products for storage, in addition to requiring curtailment of wasteful and expensive routing and back-haul transit arrangements. And it has already been shown that this extra service without extra charge imposes a heavy burden on the line haul rates.

As to the second case (122 I. C. C. 691), appellants allege that the Commission prescribed reasonable maximum rates from points in Utah, Idaho, Montana, and Wyoming to Colorado, and that the rates so prescribed are reduced by the order in this case. This is not the fact. The order in this proceeding increases the rates from Oregon, Idaho, and Montana to Colorado, as will be demonstrated by applying the intermountain scale, page 822 of the present report (R. 272), to the distances shown at page 696 of the report in 122 I. C. C. 691. The other rates prescribed in 122 I. C. C. 691 (Docket No. 16112), never became effective because our further order therein of June 24, 1927, postponed the effective date of the reduced base rates

from Colorado common points, and consolidated the case with this proceeding for further consideration. (R. 197.) Accordingly, since the only rates affected by the order in this proceeding are increased, appellants' argument that the Commission was proceeding pursuant to a supposed duty to accord products of agriculture favored treatment, seems to find little support under the real facts of that case.

Equally inaccurate is appellants' discussion (Br. 64) of rates between southern Missouri, Arkansas, Oklahoma, Louisiana, and Texas. The impression is left that only one mileage scale is applicable in this territory, that said scale was prescribed during the pendency of this proceeding, that it is materially reduced by the order in this proceeding, and that the average reduction on wheat up to a distance of 750 miles (within which appellants assert that the principal movement occurs, but for which there is no support in the record), is approximately 15 per cent. In order that the Court may get the correct picture of the grain-rate adjustment in the Southwest, a background of the situation will be given.

Prior to our decision in this case there were two mileage scales of rates in effect on grain in the Southwest, both of which had been prescribed by this Commission, one prior to the institution of the present proceeding and the other during the pendency of the proceeding. The first, referred to

herein as the *Oklahoma scale,* was prescribed July 6, 1925, in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.,* 101 I. C. C. 116, and applied between Oklahoma and Texas, also between Oklahoma and Kansas, Missouri, and Arkansas. The second, referred to herein as the *Louisiana scale,* was prescribed June 17, 1927, in *Oklahoma Millers' League* v. *A. & M. R. R. Co.,* 128 I. C. C. 523, for application only between Oklahoma and points in Louisiana west of the Mississippi River. This latter scale related the grain rates to the class rates, whereas the *Oklahoma scale* applied in a more extensive territory and bore no relation to the class rates.

The *Louisiana scale* applies to both joint and single-line hauls over the shortest possible routes, and provides for coarse grains 87.5 per cent of the wheat rates, whereas the *Oklahoma scale* is higher for joint-line than for single-line hauls up to 500 miles and the same for hauls over 500 miles. It also applies over the shortest three-line routes and provides for coarse-grain rates 90 per cent of the wheat rates. Since this scale is applicable throughout a much wider territory than the *Louisiana scale,* it is a better guide as to what the Commission's order here did to the grain rates in the Southwest.

Assuming that, as stated by appellants, the rates prescribed herein will reduce the *Louisiana scale* 15 per cent on wheat only, with little or no change in coarse-grain rates, we say this: Had appellants compared the prescribed southwestern scale with

the previously prescribed *Oklahoma scale* they would have found that on wheat the rates now prescribed for hauls over 600 miles and which are the distances grain from Oklahoma to Texas would move, are 93 per cent at 600 miles, 97.3 per cent at 700 miles, 101 per cent at 800 miles, and considerably higher for all distances over 800 miles than the previously prescribed *Oklahoma scale.* On coarse grains the prescribed rates are the same as the *Oklahoma* single-line scale at 500 miles, and for all distances over 600 miles are higher than the previously prescribed *Oklahoma-scale* rates. (101 I. C. C. at page 137; 164 I. C. C., page 822.) The order here involved prescribes rates on coarse grain the same as on wheat.

A heavy volume of coarse grains moves between Oklahoma and Texas. Therefore, when it is again remembered that the then rates were unlimited as to the number of free transit stops, free inspections, and wasteful out-of-line and b[illegible]haul service, as compared with the restrictions and limitations imposed by this order, it can not be contended that the prescribed rates will deplete the carriers' revenues. In fact, the reverse should be true, particularly having in mind that wasteful transit practices are especially characteristic of the Southwest. (R. 159, 110.)

Appellant's brief (68), referring to rates from southeastern Missouri to Cairo which Cairo had specifically claimed "to be unduly high as contrast-

ed with the rates from [should be to] St. Louis, East St. Louis, and Memphis," states that the Commission found undue prejudice which would be remedied by the rates prescribed. The remedy, so appellants say, "was brought about by materially reducing all of the rates, whether on wheat or coarse grains, to Cairo. (App. D, R. 258.) Many other illustrations could be given. It is correct, at least with few exceptions, that all rates to Cairo were reduced. But the remedying of the situation was not one-sided. Despite the fact that level as well as relation entered into the adjustment, many wheat rates from Southeastern Missouri to St. Louis and Memphis were increased or kept the same and coarse-grain rates to those points were for the most part increased. (R. 258, 259.)

It has already been mentioned that appellants have even attempted to draw an analogy between this case and the Commission's decision in the *Deciduous Fruit Case, supra*, which was reversed by this Court. Whatever similarity may exist, there is of course the one all-important distinction that that case had been reversed before the Commission's determination in this case and on the very error which appellants charged the Commission to be guilty of again. Furthermore, the Commission's order in the earlier case did in fact reduce identical rates that had theretofore recently been found not unreasonable. (*Deciduous Fruit Case,*

281 U. S. 658, 665, 666), whereas the instant decision, in prescribing the level and relation of rates throughout western territory and Illinois, merely embraces certain rates recently fixed or considered. In this connection it is important to keep in mind the matter of rate relation. When called upon to make territorial adjustments, the Commission seldom finds that its earlier piecemeal adjustments conform to the broader structure later found lawful. In fact, as stated by the Commission in its report, the piecemeal adjustments here involved were in part responsible for the general maladjustment. Local and territorially restricted adjustments must necessarily be subordinated to broad and comprehensive revisions which embrace them.

C. Appellants' statement that the Commission did give consideration to Section 15a is correct; their statement that the Commission's duties under Section 15a are to be performed in the carrying out of its power to prescribe just and reasonable rates, is also correct; but their position, in substance, that the Commission reached its determination under a supposed duty to favor agricultural products instead of in the exercise of its power to fix just and reasonable rates is (as under all chapters of their brief) incorrect.

Section 15a (2) of the Interstate Commerce Act reads as follows:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

> tories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

We agree with appellants' position (Br. 97) that the Commission's duties under Section 15a are to be performed in the exercise of its power under the provisions of the Interstate Commerce Act to prescribe just and reasonable rates. We agree with appellants' statement that the Commission did consider Section 15a, (Br. 81) and assert that it did so in the exercise of its power to fix just and reasonable rates. This will be shown presently. Appellants' contention in connection with Section 15a is the same as relied upon throughout their brief, namely, that the Commission did not reach its determination under provisions of the Interstate Commerce Act, but under a supposed duty to treat agricultural products as a favored class. This, we understand, is what appellants mean by their constant reference to the lowest possible lawful rate.

In arriving at a reasonable rate there are many factors to be considered and much evidence thereon to be weighed, but when the Commission reaches its determination as to what is the reasonable rate, that and none other is the reasonable rate. If, as in the *Deciduous Fruit Case,* it reaches such a determination under the then supposed duty to treat agricultural products affected by depression as a "favored class," a factor enters into this determination which results not in a reasonable rate under the Interstate Commerce Act or any other valid law, but in an unreasonable and unlawful rate. In support of their contention that this latter is what the Commission did appellants again set forth the Commission's reports which were entered prior to this court's decision in the *Deciduous Fruit Case,* and again including the Commission's report which was reversed in that very case. Appellants, as we conceive it, have interpreted the court's decision correctly. The Commission's sole function is the administering of the Interstate Commerce Act and related Acts as interpreted by this court when such interpretations have been made. Because of its prior misconceptions of the law the Commission in this case gave express notice that it was following the teaching of the court in the then recently announced decision in the *Deciduous Fruit Case.*

In its report the Commission stated that the question presented is whether, "under present

conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service" and that the "record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as well as the general level, is within the scope of the investigation."

The Commission's statement that it construed Section 15a to permit, but not to guarantee, the carriers to earn a 5.75 per cent return on aggregate property value, is made much of by appellants, but it seems entirely clear that this statement has reference to the words of Section 15a, that rates are to be adjusted so that the aggregate net railway operating income shall equal "as nearly as may be" the fair net return. The Commis-

sion's experience growing out of the large increases authorized following Federal control in *Increased Rates, 1920*, 58 I. C. C. 220, accounts for its statement to which appellants take exception. In *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, the Commission said, at page 99:

> The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15a, to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment can not with advantage be made dependent upon fluctuations of traffic.
>
> It is also to be noted that the duty cast upon us by section 15a is a continuing duty and looks to the future. It does not consti-

tute a guaranty to the carriers, nor is the obligation cumulative. * * *.

As above said, appellants' position is that the Commission's duties under Section 15a are to be performed "in the exercise of its power to prescribe just and reasonable rates." (Br. 88.) That very thing, is of course, stated in the opening words of Section 15a (2). The words "power to prescribe just and reasonable rates" refer back to the provisions of Section 15 (1), which empower the Commission upon finding rates to be unjust and unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act, to determine and prescribe what will be the just and reasonable rates to be thereafter observed. Thus the rate adjustments referred to in Section 15a relate to Sections 2 and 3 of the Act as well as to Section 1, and, for that matter, to adjustments of rates found violative of any other provision of the Act.

Accordingly, the Commission has done just what is required in connection with Section 15a, as well as the other sections of the Act here involved; and just what appellants assert that it is empowered to do and was its duty. That is, the Commission found rates to be unreasonable and unduly preferential and prejudicial and prescribed the just and reasonable rates for the future. And this it did after stating that in determining its problem it "must take into account not only comparisons of

distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by the law, including Section 15a"; after stating that the record required a general survey of the rates from the standpoint not only of cost but of transportation conditions as well, the relation of rates as well as the general level being within the scope of the investigation; after setting forth tables showing the carriers' returns for a period of years on book investment, after discussion of five cost studies "purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a six per cent return on that part of the property assignable to movement of wheat, and purporting to show also that rates could be materially reduced from the standpoint of cost of service." (R. 80.) In respect of these studies, among other things, the Commission said (R. 81):

> It will be understood that under the theory of these analyses the showing as to any grain or grain product will be duplicated as to any other commodity of the same loading irrespective of relative values and densities of tonnage; that the distance scale reflecting this analysis makes no provision for competitive routes of varying mileages or for differences in character of country, density

of traffic, or other incidents of transportation; and that, in order to compensate for these contingencies, the scale would have to be increased. The carriers criticize the analyses for not taking into consideration these and many other things, such as the character of equipment required, the assembling of empty cars for wheat movement, the furnishing of grain doors, etc., which are important items of cost.

The contention is not advanced in connection with any of these analyses that rates should be based solely on the cost of service. It was not denied by the proponents of these studies that other considerations should also be given weight, and that the proposed distance scales merely represented, as already stated, levels of charge that would not be considered too low from the standpoint alone of the cost of service plus a 6 per cent return on investment. The Kansas farm organizations, which actively participated in this inquiry, while fully adopting the theory and results of the interstate study, expressly rejected any proposal to make rates solely on the basis of cost, and proposed a scale of rates on wheat which is substantially higher than the scale proposed in that analysis.

It is apparent from the above, and from the other statements of the Commission above given, that not only the showing of the cost studies but many other elements entered into the Commission's determination. In the absence of the record such elements and evidence thereon can not be shown,

but under the rule of this court it must be assumed that the evidence supported the Commission's determination that the theretofore rates were unreasonable and unduly preferential and prejudicial and that the rates prescribed were the just and reasonable rates to be thereafter observed.

Appellants contend that in such a case as this dealing with the rates on an important class of traffic covering two rate groups, Section 15a contemplates a specific finding that the rates were so high as to cast an undue burden on the grain traffic as contrasted with other traffic under a rate structure sufficient to yield a fair rate of return out of all traffic. But Section 15a makes no requirement of such precise finding, for as recognized by appellants the Commission's duties thereunder are to be performed in the exercise of its power to prescribe just and reasonable rates. Appellants urge that the relating of rates to other rates at a time when the carriers are shown not to be earning the return to which they are entitled, could not result in rates which would yield on a particular traffic its proper proportion of the return to which the carriers are entitled. First off, this assumes that the rates were fixed by mere relation to other rates whereas cost studies and many other factors are shown to have entered into the determination even on the face of the report. In the absence of any allegation that the order was unsupported by evidence, and in the absence of the record, it follows

that the order must be taken as supported by the evidence.

Moreover, appellants' argument assumes much. Although final valuations have not been available, the Commission, since Transportation Act, 1920, has prescribed rates with its duty in mind of promoting an adequate transportation system. This is evidenced by the large horizontal increases authorized in *Increased Rates, 1920,* 58 I. C. C. 220, which for sound transportation reasons above mentioned (p. 67) were in part reduced pursuant to authority in *Reduced Rates, 1922,* 68 I. C. C. 676. It is shown by cases which appellants themselves mention. (Br. 84, 85.) As to rates voluntarily established, it would seem that they would have been fixed to the best of the carriers' judgment to yield "as nearly as may be" their proper proportion of carrier return. In short, appellants' argument would assume that, in fixing rates, other rates have no evidential value unless the ideal of exact return on exact value is being realized in a rate group. In any event here there was a full record of all kinds of evidence. The just and reasonable rates fixed in this case, with all considerations present, constitute rates which will bear their fair burden of the return to which the carriers are entitled, in so far as the administrative judgment of the Commission enabled it to arrive at such result.

This case well illustrates that the Commission can not reconstruct the country's rate structure as

a whole. It could not do that even as to a rate group because, as is shown here, rates on traffic which is competitive have to be properly related regardless of any rate grouping. In short, general reconstruction of the rate structure has to be undertaken, having due regard to the sections of the country where rates on the particular traffic should be properly related to each other. The size of this record shows that all rates of the country as a whole could not be undertaken in one proceeding. As stated in the *New England Divisions Case*, 261 U. S. 187, 197,

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed.

Appellants concede that Section 15a does not prohibit the Commission from reducing an unreasonable rate, even though the carriers' returns may be inadequate. (Br. 98.) And, of course, if the Commission uncovers an unreasonable rate during its task of reconstructing the country's rate structure, it must reduce that rate to a reasonable level, for otherwise it would be perpetuating the condition.

The Hoch-Smith Resolution, however, requires the Commission to undertake the task of reconstructing all rates of the country. And although valuations have not been completed, the Transportation Act looks to the Commission to do all that it can to maintain an efficient transportation service. The Commission's determination in this

case gives effect to its best administrative judgment on the problem presented."

(1) The order effected great economies under the line haul rates, and the general increases in rates on coarse grains went mostly to carriers in special need thereof.

At the close of its report the Commission said:

> While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings.
>
> It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues. We therefore invoke the aid of carriers in establishing the rates herein prescribed with the greatest possible expedition in order that this new rate structure may receive a speedy test.

The Commission's sworn answer denied the allegation of the petition that the reductions in rates would result in revenue loss of $20,000,000 annually. (R. 568.) As above shown its report said that "the revenue effects will be substantial" but that is qualified by the statement that the full effects upon revenue could not be foretold in view of the elimination of transit balances from primary markets and limitations imposed upon "transit." By the latter the Commission was referring to the limitation to two free stops in transit, all others to be paid for, the abolishment of the "unit rule" and the general condemnation of wasteful transit practices. The burden imposed on the line haul rates by these wasteful practices has already been pictured in so far as shown on this record. And it will be recalled that under Section 15a rates are to be adjusted so that the carriers will under efficient and economical management earn the prescribed return. As to the elimination of transit balances lower than the proportionals the Commission had expressed the belief that this would not only preserve but substantially increase carriers' revenues through primary markets even with substantial reductions in the flat inbound and proportional outbound rates. This it thought would result despite any change in the channels of movement resulting from the elimination of overhead rates with transit. (R. 643.)

Appellants mention that certain of the rates had recently been found to be reasonable, but they lose sight not only of the fact that rate relations were

readjusted over a vast territory but also of the fact that the former rates covered a great amount of wasteful service.

Attention is also again called to the wide increases effected in rates on coarse grains. At pages 82 to 84, inclusive, of their brief, appellants reproduce in its entirety that portion of the discussion in the Commission's report (R. 77, 78) which deals with the financial condition of the carriers in the western district. In that discussion it is said that for 10 railroads (shown in the footnote on page 83 of appellants' brief) having 75 per cent or more of their mileage in western trunk-line territory the average rate of return on book value was 2.97 per cent in 1927. With the single exception of the Oregon-Washington Railroad & Navigation Company, which operates in the Pacific Northwest, this is the poorest showing of any of the carriers referred to.

The Court will observe that the 10 railroads mentioned operate mostly east of the Missouri River, in the territory where coarse grains predominate (R. 207) and where the rates on such traffic have been increased. The importance of the coarse-grain traffic to these carriers is explained on page 651 of the Commission's report (R. 101) as is also the proportion of the coarse-grain production to the total grains produced. For example, it will be noted that on the Chicago & Northwestern, one of the 10 carriers named, coarse grains were 70 per cent of its total grain traffic. A glance at a railroad

map will show that the great bulk of this carrier's lines are in Iowa, Minnesota, and Wisconsin, where, as already stated, the coarse-grain rates have been substantially increased.

In the same discussion, the Commission also said:

> The carriers point out that the unfavorable financial showing among the carriers is most pronounced with the important coarse-grain carriers, whose rates were most affected by that reduction. [Referring to reductions in a previous case, 64 I. C. C. 85.]
>
> A comparison of operating results does suggest that the relatively low level of coarse-grain rates is at least partially responsible for the unfavorable financial showing of the coarse-grain carriers, especially in western trunk-line territory. For instance, in a group of 21 carriers with combined annual freight revenues of approximately $2,000,000,000, 9 of them, with relatively low coarse-grain tonnage, exceeded their statutory return by nearly $35,000,000, while the other 12, with a large coarse-grain tonnage, were short of their statutory return by more than $75,000,000. (R. 101, 102.)

The above indicates that when this case was decided at least nine of the important so-called wheat carriers were making in excess of 5¾ per cent. It also shows that, by increasing the rates on coarse grains, consideration was given to the special needs of the so-called coarse-grain carriers.

This analysis, even as available on the face of the report, taken together with the elimination of waste above mentioned, shows that there were sound reasons behind the Commission's statement that it was "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation." The fact that it was so satisfied, coupled with the impossibility of accurately forecasting what would result, was clear warrant for the Commission's suggestion that the radically changed rate structure and practices thereunder be given a reasonable trial, after which situations requiring further consideration might be brought to its attention. This procedure has met with the implied approval of this court in *R. R. Comm. of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 591, and in *New England Divisions Case*, 261 U. S. 184, 201. Compare *Darnell* v. *Edwards*, 244 U. S. 569, 570; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *Louisville* v. *Cumberland T. & T. Co.*, 225 U. S. 430.

In the second case cited the court said:

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently, and although the tribunal is convinced, when entering the order thereon, that upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no

more a transfer of revenues pending a decision than was the like action in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carrier. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

II. THERE WERE NO IRREGULARITIES IN THE COMMISSION PROCEEDINGS

At the close of its report the Commission, in commenting upon the revenue effects of the reductions and increases ordered, stated that it had made many different checks and estimates, and in connection with the statement that maintenance of adequate transportation service would not be endangered it said: "We say this especially in the light of increased revenues already granted in certain other cases * * *."

Appellants contend that the Commission's reference to checks and estimates and to increases already granted brings the situation within the doctrine that parties must be apprised of evidence used so that they may have an opportunity to cross examine or rebut. *Int. Com. Com.* v. *L. & N. Ry.*, 227 U. S. 88; *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274.

The checks and estimates referred to by the Commission were of course in respect of matter put into the record as to which appellants had had

their opportunity of cross-examination and rebuttal. A charge of denial of due hearing can not be predicated upon the fact that appellants were not allowed opportunity of cross-examination and rebuttal in respect of the step-by-step mental processes entering into the Commission's determination.

As to the Commission's mention of increases already made in other parts of its general investigation, it is going far to say that the Commission could not, or indeed should not, have had in mind such increases. The revenue results of those increases could not, it is true, be definitely known in advance of trial. But that was also true of the reductions and increases in the present case. The carriers had had due hearing in the proceeding in which the increases were granted. Surely there was no denial of due hearing to the carriers because the Commission did not divorce its mind of the fact that those increases had been made any more than there was denial of due hearing to shippers because the Commission in ordering in those increases did not, it may be assumed, close its eyes to the fact that the reductions here involved had been ordered.

III. THERE WAS NO ABUSE OF DISCRETION BY THE COMMISSION IN DENYING THE SEVERAL MOTIONS FOR REHEARING AND RECONSIDERATION

Appellants' brief devotes a chapter to the Commission's denial of their petitions for rehearing and

reconsideration, which they assert constituted an abuse of discretion.

In most of its larger proceedings the Commission is confronted with petitions for rehearing and reconsideration based, similarly as here, on alleged changed conditions. The statute necessarily leaves the matter of reopening to the discretion of the Commission. (Sec. 16a, I. C. Act.) Sound reasons must appear therefor, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned on the same grounds.

The special reason advanced by appellants for rehearing was the falling off of their revenue due to diminishing traffic, which in turn was due to sharp general industrial depression. At the same time appellants call attention to the *Fifteen Per Cent Case*, 1931 (Ex Parte 103), 178 I. C. C. 539, in which the Commission, although denying the horizontal increase asked for, suggested to the carriers certain measures to meet the situation. The contention is then in reality that, with respect to a situation calling for general emergency relief, the Commission abused its discretion in not reopening a particular docket wherein a determination had been reached after regularly conducted hearings. The question involved in the *Fifteen Per Cent Case* was how general emergency relief could best be given without further depressing business, traffic,

and revenues, and without disturbing rate relationships, interstate and state, which to many shippers are more important than the level of rates. That question of general emergency relief is not the question here.

The determination here involved was reached after more than a year of hearings, and another of study, and on a record, in the making of which carriers and shippers throughout western territory cooperated to the full. The readjustment was urgently needed, correcting as it did not only the level but the relation of rates and discriminatory and wasteful practices under the rates. The increases in coarse-grain rates went generally where most needed. Unquestionably reopening would have meant further lengthy proceedings, since the very condition of diminishing traffic would have been used in evidence and argument against a higher level of rate; and when a new determination had been reached general conditions might again have become normal.

In performing its legislative function of prescribing reasonable rates the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record. That determination can not reflect accurately fluctuating conditions.

Even in the record brought here there is much to show that the petitions for rehearing were rightly denied, and in view of the absence of the evidence

before the Commission, it would seem that it should be concluded, not only that the Commission did not abuse the discretion reposed in it, but further that the evidence as a whole impelled denial of the petitions for rehearing.

CONCLUSION

The decree of the lower court denying the application for preliminary injunction should be affirmed.

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APPENDIX (THE STATUTES INVOLVED)

The following provisions of the Interstate Commerce Act (U. S. Code, Title 49, Chap. 1) are important in the consideration of this case:

Section 1 (5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *.

Section 3 (1):

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15 (1):

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by

the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed; and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be,

and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15a (2) and (3):

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation. * * *

Hoch-Smith Resolution (Joint Resolution of January 30, 1925, U. S. Code, Title 49, Sec. 55):

That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution, the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find

to be necessary or appropriate upon the re
ord then made in order to place the rat
upon designated classes of traffic upon
just and reasonable basis with relation
other rates. Such investigation shall
conducted with due regard to other inves
gations or proceedings affecting rate a
justments which may be pending before t
Commission.

In view of the existing depression in agr
culture, the Commission is hereby direct
to effect with the least practicable del
such lawful changes in the rate structu
of the country as will promote the freedo
of movement by common carriers of t
products of agriculture affected by that d
pression, including livestock, at the lowe
possible lawful rates compatible with t
maintenance of adequate transportati
service: *Provided*, That no investigation
proceeding resulting from the adoption
this resolution shall be permitted to del
the decision of cases now pending before t
Commission involving rates on products
agriculture, and that such cases shall
decided in accordance with this resolutio

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